Indiana INVESTIGATES

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In this issue:

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2007 Meetings

Indiana Auditors and Investigators
Quarterly Meetings:

Thursday, June 21, 9:00-10:30
IGCS Conf. Rm. A
Thursday, September 20, 9:00-10:30
IGCS Conf. Rm. 17

Agency Contact List

The OIG is putting together a contact list for all audit and investigative groups in all state agencies. If you have not already done so, please send names, addresses, phone numbers, and job titles to Melissa Nees, mnees@ig.in.gov. With your cooperation, we hope to have this available soon.

Does your agency have news or ideas to share? We would love to hear from you. Please email Melissa Nees at mnees@ig.in.gov.

MEETING SUMMARY

March 22, 2007

At our March 22 meeting, FSSA Special Investigator Sylvia Stincic-Ferry gave a presentation on the FSSA Compliance Division. The Compliance Division conducts investigations of alleged fraud and wrongdoing in the public assistance programs of TANF, Food Stamps, the Child Care payment program, and recipient Medicaid fraud. The Compliance Division also investigates contracted service providers, including the First Steps program, IMPACT (Welfare to Work) contractors, and other service providers referred to them by FSSA Audit Services.

During the course of investigations, they conduct investigative interviews, collect and secure evidence, examine fiscal records to ascertain fraudulent billings, and receive and investigate complaints from the public, FSSA , and other state agencies concerning FSSA program violations. They also prepare and file formal complaints against offending or alleged offenders on behalf of FSSA and testify on behalf of the state at criminal or civil trails, or at administrative hearings.

The issues involved in public assistance investigations usually involve questions of income, financial resources, and who is residing in the applicant or recipient's household. TANF and Food Stamps benefits are issued via a "Hoosier Works" Electronic Benefit Transfer card, and the use or possession of this card may be an issue. Other issues may involve state residency, identity questions, false or forged documentation, and double dipping in other states.

The majority of public assistance fraud referrals are sent to them electronically by the county based staff of the Division of Family and Children. Each county office has a designated "Fraud Referral Coordinator" (FRC) who receives and evaluates situations identified by caseworkers. For example, a caseworker may suspect that an applicant is not being truthful while applying for public assistance payments. The FRC acts as the contact person to the Compliance Division. Referrals are routed electronically from the FRC to the north or south Compliance Division supervisor, who assigns the case to an investigator working that geographic area.

They also receive some referrals from the public via a 1-800 Fraud Hotline and from internet email to the FSSA web site. These referrals are tracked by a tracking number and special software maintained by FSSA technical support. The data from these records is used for Federal reporting requirements.

The Compliance Division receives or opens approximately 1200 investigations per year in the public assistance programs, and 150-200 Child Care Development Fund investigations. A program or rule violation is discovered in about 50% of these cases. Remedies available include administrative sanctions or disqualifications, civil recovery action, and referral for criminal prosecution. According to the Indiana Criminal Code, Welfare Fraud in amounts between $250 and $2,500 is a Class D Felony; over $2,500 is a Class C Felony.

Throughout their investigations, the Compliance Division has found that fancy cars and nice homes are some of the things that are bought with fraudulent welfare benefits.

OBTAINING CREDIT FOR CONTINUING EDUCATION

One proposed benefit of our quarterly Indiana Auditor and Investigator meetings is to obtain credit towards our continuing education training requirements. In our December Summit and our first Indiana Investigates meeting on March 22, 2007, it was requested that we pursue certifying our quarterly meetings for these training purposes. In addition to our desire to remain educated on auditing and investigative procedures, we also want to stay in compliance with Indiana statutory requirements.

Indiana law requests that a law enforcement officer[1] must complete this basic training to be eligible for continued employment and states that the minimum standards are defined by promulgated rules adopted by the Board of the Indiana Law Enforcement Academy (ILEA).[2]

From further inquiry from the ILEA, we have learned that an attorney or a teacher may be certified to present this required training. Inspector General David Thomas is currently pursuing this training through the ILEA and will hopefully be certified by our September meeting.

The requirements for auditors to obtain CPE credits are slightly different, yet still attainable. CPE credit will be awarded for whole hours only with a minimum of 50 minutes constituting one hour. As an example, 100 minutes of continuous instruction would count for two hours; however, more than 50 minutes but less than 100 minutes of continuous instruction would count for only one hour.

In addition to the above requirements, the OIG (or host) will need to provide an agenda, itemized by discussion topics and approximate time segments. The OIG must also provide a sign-in sheet to document the attendance of those seeking credit.

Each of our quarterly meetings has provided a speaker who gave a presentation on an investigative or auditing topic. In addition to these speakers, discussions have resulted following the speakers' presentation. Considering the above statutory requirements, the reality is that we are training ourselves in our quarterly meetings. Therefore, we should receive this training requirement for attending our meetings.

We are now actively pursuing the authorization to qualify for this certified training. You are also welcome to share this information with other auditors and investigators in your units. This may be an additional incentive for people to attend and hear the presentations now that we are pursuing certification for continuing education.

Footnotes:

1 I.C. 5-2-1-2 defines law enforcement officers for training requirement purposes, stating, " 'Law enforcement officers' means an appointed officer or employee hired by and on the payroll of the state…who is granted lawful authority to enforce all or some of the penal laws of the State of Indiana and who possess…the power to affect arrests…"

2 I.C. 5-2-1-9(g)

Inside the mind of a white collar crook

CON ARTIST PSYCHE

by Mark Mathosian

It's called profiling. Getting into a criminal's mind to see what makes him tick. Because human behavior is so complex, profiling criminals is an iffy endeavor, at best. Still, psychologists and criminologists have identified some traits that appear to be consistent in criminals. Here is some insight into the psyche of the white collar swindler trying to empty your bank account.

The motives

Experts say that in most cases of economic fraud financial stress is in the equation. Financial stress means that crooks believe they are economically deprived in relation to what they feel is their niche on the social ladder.

Keeping up with the Jones's

They have a strong desire to own expensive cars, houses, jewelry, boats, and whatever else gives them pleasure or status. Financial stress also means being afraid to lose possessions they already own. This means ripping you off so they can make the Mercedes payments. The bottom line is that they believe they are worthy of the good life at your expense.

For some crooks, swindling you is viewed as a temporary solution to their current financial problems. Once they reach a financial level they are comfortable with, they stop their illegal behavior. For other crooks, stealing from you fuels their huge egos. They enjoy the power they receive by deceiving you, leading you on, and stealing your money. For this type of crook the exhilaration of the swindle becomes a reward in itself. Here's a quote from a young con man reported on MSNBC News that illustrates this point. "It's like driving down the road speeding, thinking, 'I am the man. Look at me, I am the king of the world. I pulled this off. I got what I wanted.'"

Psychologists also believe fraudsters rationalize their behavior to justify criminal acts. For example, when they steal from a large corporation, the government, or a wealthy investor, they think "they can afford it." This is a way of trivializing the crime so in their minds it becomes a victimless crime.

Some crooks also have a warped sense of reality that allows them to believe everyone is basically crooked and therefore it is ok to steal from you. Their mindset is, if they don't get you, you will get them. Others believe everyone commits certain types of fraud, like cheating on your income taxes or padding a business expense account. To them, this is normal and socially acceptable behavior. Rationalizing these acts makes it easy to avoid feelings of guilt. No need for a conscience because everyone does it.

Experts also believe it takes a special kind of crook to commit a face-to-face crime like investment fraud. Crimes like this have historically been referred to as "crimes of confidence," hence, the term con man. These are crooks who steal the life savings of senior citizens and spend the stolen money on junkets to Las Vegas. Personality traits they exhibit include lack of empathy, remorse, or

conscience. Interestingly, studies also reveal they tend to enjoy acting. After all, acting is a form of deception.

Psychological studies reveal that swindlers can be impulsive, amoral, and detached from normal relationships. Aloof and self-centered is another way to describe them. These are not the kind of people you want managing your family's inheritance.

Thanks to the internet, e-mail, faxes, and cell phones, financial thieves no longer have to look you in the eyes to rip you off. They will sucker you over the phone and you won't know their real names, what they look like, or where they are. Samples of these frauds include foreign lottery swindles, Nigerian advance fee money scams, on-line auction frauds, and most forms of identity theft.

Finally, here's something to think about. Many of the traits white collar crooks demonstrate are considered positive attributes in honest people: the desire to better oneself, to rise up the economic ladder, to be successful in your chosen profession. That's why when a white collar swindler gets caught you hear people say, "He was so nice, so smart, he could have been successful at whatever he tried. Too bad he chose a life of crime."

Mark Mathosian is a Financial Administrator with the Florida Office of Financial Regulation. His background is in financial fraud investigations, banking, finance and securities. He can be reached at mark.mathosian@fldfs.com. 850-410-9859.

THE IMPACT OF GARRITY VS. NEW JERSEY

The rules on how to investigate public employees

by Kristi Shute, OIG Special Agent

Garrity v. New Jersey[1] and its progeny defined the manner in which investigations of public employees are conducted. *Garrity* supports the notion that the Self-Incrimination Clause of the Fifth Amendment prohibits the State from putting individuals in the cruel dilemma of becoming a witness against themselves or suffering a penalty for remaining silent.[2] The Fifth Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.[3] This article discusses the main holdings of *Garrity* and the line of cases that followed, the current state of *Garrity* in Indiana, and a recent decision in California that could change the way immunity is granted to public employees, if adopted in other jurisdictions.

The *Garrity* line of cases establishes three core principles.[4] First, if a public employee answers his employer's questions under an explicit threat that he will lose his job if he invokes his Fifth Amendment privilege against self-incrimination, his answers cannot be used against him in a criminal proceeding.[5] Second, unless a public employee has been given at least use immunity for his answers to questions, he may not be fired for invoking his Fifth Amendment privilege.[6] Third, however, if the public employee has been given at least use immunity, he may be fired if he continues to refuse to answer questions that are specifically, directly, and narrowly related to his performance of official duties.[7]

In *Garrity*, police officers were questioned about allegedly fixing traffic tickets. Before questioning began, each officer was warned that anything they said might be used against them in any state criminal proceeding; that they had the privilege to refuse to answer if the disclosure would tend to incriminate them; but that if they refused to answer, they would be subject to removal from office. Faced with that prospect, the officers answered the questions. The officers' answers were then used against them in criminal proceedings. The officers were convicted over their protests that the statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department.

The Supreme Court stated that the choice imposed on the officers was one between self-incrimination or job forfeiture.[8] As such, the Court felt that the statements were infected by the coercion inherent in the scheme of questioning and could not be sustained as voluntary.[9] The Court posed the question as whether the State, contrary to the requirement of the Fourteenth Amendment, could use the threat of discharge to secure incriminatory evidence against an employee.[10] The Court held that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all members of the body politic.[11]

In other words, *Garrity* does not allow a public employee's statement, given during an internal investigation, to be used against him later in a criminal procedure. In practical terms, the internal and criminal investigations must

be kept separate so that there is no risk of tainting evidence obtained in the criminal investigation. If the evidence obtained from the criminal investigation is done so through information gained in the internal investigation, that evidence, and anything derived from it, would be excluded from being introduced in a criminal trial.

Another case handed down by the Supreme Court shortly after *Garrity* was the case of *Gardner v. Broderick*. This case involved a police officer who appeared under subpoena before a grand jury to testify about suspected bribery and corruption in the police force.[12] Prior to testifying, the officer was informed of his Fifth Amendment privilege against self-incrimination, but was then asked to sign a "waiver of immunity" form. The officer was told that if he did not sign the waiver, he would be fired pursuant to a state statute. The officer refused to sign the waiver and was fired for the refusal.

The Court presented the question as whether a police officer, who refuses to waive the protections which the privilege gives him, may be dismissed from office because of that refusal.[13] The Court held that where a public employee invokes his Fifth Amendment privilege against self-incrimination, the employee may not be fired for that reason.[14] The Court made clear, however, that as long as the employee was protected from possible use of answers in a criminal proceeding, the employer could insist on answers on pain of dismissal.[15] The Court stated that if the officer refused to answers questions specifically, directly and narrowly related to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.[16]

In addition to *Gardner*, another important decision was handed down by the Supreme Court on the very same day.[17] In *Sanitation Men*, fifteen sanitation employees were summoned to testify about alleged corruption. Pursuant to a state statute, the employees were told that if they refused to testify on Fifth Amendment grounds, they would be fired. Twelve employees exercised their Fifth Amendment privilege and were later fired. The remaining three employees answered questions and denied the allegations. Those three employees were then summoned to testify before a grand jury and asked to sign waivers of immunity. All three refused and were later dismissed for refusing to sign the waiver.

The Court stated that the employees were not discharged merely for refusal to account for their conduct as employees of the city.[18] The Court noted that they were dismissed for invoking and refusing to waive their constitutional right against self-incrimination.[19] At the same time, the Court held that public employees subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.[20] Because the state wished to retain the right to use their answers for a criminal prosecution, and not merely an accounting of their use or abuse of their public trust, the employees could not be dismissed for invoking the privilege.[21]

These cases ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination and the need of the State to obtain information to assure the effective functioning of government.[22] Immunity is required if there is to be rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.[23] Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use.[24] Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have

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means at its disposal to secure testimony if immunity is supplied and testimony is still refused.[25] Given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment.[26]

Likewise, the Fifth Amendment permits the government to use compelled statements obtained during an investigation if the use is limited to a prosecution for collateral crimes such as perjury or obstruction of justice.[27] This rule applies with equal force when the statements at issue were made pursuant to a grant of *Garrity* immunity during the course of a public employer's investigation of its own.[28] As a matter of Fifth Amendment right, *Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation.[29] *Garrity*, however, does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it.[30]

Indiana Courts have not narrowed the application of *Garrity* in any way. There is only one unpublished decision that deals with *Garrity* issues.[31] That case involved a juvenile probation officer, Morgan, accused of sexual misconduct with a probationer he was supervising. When the judges of the Shelby County Court learned of the accusation, they confronted Morgan. He denied the accusation and the judges directed him to submit to a polygraph test. Before administering the test, the examiner did not explain to Morgan that he could not be coerced into waiving his Fifth Amendment privilege against self-incrimination under threat of losing his job. Morgan was asked to sign a document entitled "Polygraph Waiver" that was labeled "For Administrative Use Only." Morgan signed the document after making some changes to it and after protesting that many of the provisions did not apply to him because he felt he was being coerced into taking the test under threat of losing his job. When the judges were told that he failed the test, they fired him.

Morgan argued that the *Garrity* line of cases establish a duty on the part of a public employer to advise an employee fully of his Fifth Amendment privilege before any questioning that might lead to dismissal.[32] The Court understood Morgan to be arguing that his answers could not be used against him for employment and disciplinary purposes unless he first received an explanation of his specific Fifth Amendment immunity privilege.[33]

The Court held that nothing in the *Garrity* line of cases require a public employer to give what are, in essence, Miranda warnings for questioning that does not amount to custodial interrogation.[34] The Court held that the current state of the law can enable an employer to take advantage of ambiguity and uncertainty.[35] The Court stated that an employee who does not understand his rights, or one who is unwilling to take the risk of refusing to answer questions, may answer questions under circumstances when he might have the constitutional right to refuse to do so.[36] The Court also stated that the employee cannot first answer the employer's questions in the hope of persuading the employer not to take adverse action, and then, if he is unsuccessful in persuading the employer, sue the employer for using his answers against him.[37] The Court noted that *Garrity* and its progeny bar discharge or discipline of a public employee who steadfastly asserts his Fifth Amendment privilege, but not one who agrees, however reluctantly, to answer questions.[38] The Court stated that no cases require an employer to forget an employee's answers to questions when making decisions about the employee's employment status.[39] The Court held that there is nothing that extends *Garrity* and its progeny to the point that an employee who has answered questions, even under coercive circumstances, may prohibit an employer from considering those answers in making decisions about his employment.[40]

One final case worth noting, *Spielbauer v. County of Santa Clara*, is a recent decision out of California which could alter the way disciplinary investigations are conducted, should the holding be adopted in other jurisdictions.[41] In this case, Spielbauer became the subject of a disciplinary investigation. He refused to answer questions, even after being told by the investigator that his statements would not be admissible in a subsequent criminal investigation, because he was not given a formal grant of immunity from a court. He was fired for, among other reasons, insubordina

tion for refusing to answer the investigator's questions. He challenged his termination and argued that no public employee could be compelled to answer questions in a disciplinary investigation unless the employer first obtained a formal grant of immunity from the use of the interview or the fruits of the interview in a subsequent criminal prosecution. The County argued that the operation of immunity under *Garrity* was automatic, and that the moment it used its authority as an employer to compel Spielbauer to answer the questions, his answers were immunized, and thus his constitutional rights were fully protected.**42**

The Court rejected that argument and held that an employer's promise that compelled statements could not be used in a criminal prosecution was an inadequate protection for an employee's Fifth Amendment rights.**43** The Court also held that the employer must obtain a formal grant of immunity before an employee can be forced to participate in a disciplinary interview.**44** Even though the investigator stated that Spielbauer's answers could not be admitted in a criminal prosecution, an apparent allusion to the rule of exclusion, he never granted or offered immunity.**45** The failure to offer immunity was fatal to any attempt to discipline Spielbauer for remaining silent.**46** The Court held that in the absence of a formal grant of immunity Spielbauer could not be guilty of insubordination for failing to answer incriminating questions.**47** Because no immunity was granted or offered in this case, Spielbauer could not be compelled to answer potentially incriminating questions, and his refusal to do so could not form the basis for discipline.**48**

In sum, the holdings of *Garrity* and its progeny have withstood the test of time. A public employee may not be discharged for invoking their Fifth Amendment right to remain silent, but cannot refuse to answer questions in an internal investigation once they are granted immunity. In addition, anything they say in the internal investigation cannot be used in a criminal investigation. Change, however, could be on the horizon if jurisdictions in addition to California agree that a public employee cannot be compelled to make a statement until they are granted formal immunity.

Footnotes:
1 *Garrity v. New Jersey*, 385 U.S. 493 (1967).
2 Mary A. Shein, *The Privilege Against Self-Incrimination Under Siege: Asherman v. Meachum*, 59 Brooklyn L. Rev. 503, 532 n.140 (1993).
3 *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).
4 *Morgan v. Tandy*, Cause No. IP 99-535-C H/G, 2000 U.S. Dist. LEXIS 7446, at *11 (S.D. Ind. Feb. 28, 2000).
5 *Id*. at *11-12.
6 *Id*. at *12.
7 *Id*.
8 *Garrity*, 385 U.S. at 496.
9 *Id*. at 497.
10 *Id*. at 499.
11 *Id*. at 500.
12 *Gardner v. Broderick*, 392 U.S. 273 (1968).
13 *Id*. at 276.
14 *Id*. at 279.
15 *Id*. at 276.
16 *Id*. at 278.
17 *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968).
18 *Id*. at 283.
19 *Id*.
20 *Id*. at 285.
21 *Id*. at 284.
22 *Lefkowitz*, 414 U.S. at 81.
23 *Id*.
24 *Id*. at 84.
25 *Id*.
26 *Id*.
27 *See United State v. Wong*, 431 U.S. 174, 178 (1977) ("The Fifth Amendment privilege does not condone perjury."); see also *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (holding that "neither the [federal use] immunity statute nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements."); *United States v. Mandujano*, 425 U.S. 564, 576 (1976) ("In this constitutional process of securing a witness' testimony, perjury simply has no place whatsoever.").
28 See *United States v. Veal,* 153 F.3d 1233, 1243-44 (11th Cir. 1998).
29 *Garrity*, 385 U.S. at 500.
30 *Veal*, 153 F.3d at 1243-44.
31 *Morgan v. Tandy*, Cause No. IP 99-535-C H/G, 2000 U.S. Dist. LEXIS 7446 (S.D. Ind. Feb. 28, 2000).
32 *Id*. at *19.
33 *Id.*
34 *Id*.
35 *Id*. at *21.
36 *Id.*
37 *Id*.
38 *Id.*
39 *Id*. at *22.
40 *Id*. at *23.
41 *Spielbauer v. County of Santa Clara,* 146 Cal. App. 4th 914 (2007).
42 *See Aguilera v. Baca*, 394 F.Supp. 2d 1203, 1221 (2005) ("This is the so-called *Garrity* immunity which automatically attaches to compelled testimony.")
43 *Spielbauer*, 146 Cal. App. 4th at 929.
44 *Id*. at 926.
45 *Id*. at 932.
46 *Id*. at 933.
47 *Id*. at 926.
48 *Id*. at 949.